BRB No. 99-0681 BLA

CORBIN L. WRIGHT)
)
Claimant-Respondent)
)
v.)
) DATE ISSUED: ______________
MANNING COAL CORPORATION)
)
and)
)
KENTUCKY CENTRAL INSURANCE)
COMPANY)
)
Employer/Carrier-)
Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Administrative Law Judge Thomas F. Phelan, Jr., Administative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Roberta K. Kiser (Ferreri, Fogle, Pohl & Picklesimer), Lexington, Kentucky.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (90-BLA-2381) of Administrative Law Judge Thomas F. Phalen, Jr. on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. The procedural history relevant to this appeal is as follows.

Claimant worked as a coal miner for a total of at least nineteen years. Hearing Transcript at 25; Decision and Order on Remand at 6. In 1973, claimant left coal mining because he was turned down for employment when his chest x-ray was read as positive for silicosis. Director's Exhibit 17; Hearing Transcript at 76. In March 1974, claimant was examined by Dr. D.L. Odom, who diagnosed "C.W. Pneumoconiosis, category 2/3q," and stated that claimant was "totally and permanently disabled for coal mining and work in a dusty environment." Director's Exhibit 17. In April 1975, claimant received a workers' compensation award from the State of Kentucky. The award read, "[P]laintiff . . . became totally and permanently disabled on or about December 1, 1973, as the result of the occupational disease of pneumoconiosis and/or silicosis, arising out of and in the course of his employment as a coal miner." *Id.* Despite the state award, claimant returned to work in 1976 and continued to work in coal mine employment until January 15, 1986. Hearing Transcript at 59.

On March 24, 1986, claimant filed his first application for federal black lung benefits. Director's Exhibit 17. The district director denied claimant's application on the grounds that claimant failed to establish any element of entitlement and that his claim was barred by the three-year statute of limitations for filing a claim prescribed by the Act. *Id.* Claimant's counsel responded that claimant no longer intended to pursue his claim. *Id.* Consequently, the district director issued an order finding that the medical evidence of record did not establish any element of entitlement and that claimant's application was untimely filed. *Id.* The district director's order indicated further that the claim would be deemed abandoned if claimant did not respond within thirty days. *Id.* Claimant took no further action on the 1986 claim. Hearing Transcript at 82.

On March 22, 1989, claimant filed his second application for benefits. Director's Exhibit 1. The district director denied the claim because he found that claimant did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d). Director's Exhibit 11. Claimant requested a hearing, which was scheduled but continued several times. Director's Exhibits 12, 22, 26, 29, 32. Before a final hearing date could be set, Administrative Law Judge Bernard J. Gilday issued an order to show cause why the 1989 claim should not be dismissed as untimely filed. Order to Show Cause, November 9, 1992; Director's Exhibit 34. After considering the parties' responses, Judge Gilday

ruled that both of claimant's claims were untimely because neither claim was filed within three years of the time that claimant received Dr. Odom's 1974 report or the 1975 state workers' compensation award. Order of Dismissal, December 8, 1992; Director's Exhibit 45. Finding that there were no extraordinary circumstances to justify a waiver of the statutory time limit, Judge Gilday dismissed claimant's 1989 claim. *Id*.

Pursuant to claimant's appeal, the Board vacated Judge Gilday's order and remanded the case for him to hold a hearing and make specific findings regarding whether employer rebutted the presumption of 20 C.F.R. §725.308(c) that claimant's claim was timely filed. *Wright v. Manning Coal Corp*., BRB No. 93-0838 BLA (Jul. 27, 1994)(unpub.); Director's Exhibit 57. In this regard, the Board instructed Judge Gilday to determine whether Dr. Odom's 1974 report or the 1975 workers' compensation award constituted a medical determination of total disability due to pneumoconiosis sufficient to trigger the three-year time limit under 30 U.S.C. §932(f), 20 C.F.R. §725.308, as construed by the Board in *Adkins v. Donaldson Mine Co*., 19 BLR 1-34 (1993). The Board further instructed Judge Gilday that if he found that claimant's 1986 claim was timely filed, he must determine whether the 1986 claim was still pending, was withdrawn, or was denied as abandoned. Then, depending upon the procedural status of the 1986 claim, Judge Gilday was to decide claimant's 1989 claim accordingly.[1]

Because Judge Gilday was no longer with the Office of Administrative Law Judges, on remand the case was reassigned without objection to Administrative Law Judge Thomas F. Phalen, Jr., who held a hearing on November 17, 1998 and admitted additional evidence into the record. In his Decision and Order on Remand, the administrative law judge found that employer did not rebut the presumption that claimant's 1986 claim was timely filed. Specifically, the administrative law judge found that Dr. Odom's 1974 report and the 1975 workers' compensation award were not sufficient under *Adkins* to trigger the statutory time limit for filing a claim. The administrative law judge therefore concluded that claimant's 1986 claim was timely filed. The administrative law judge additionally found that although the 1986 claim was timely filed, it had been finally denied as abandoned. Consequently, the administrative law judge concluded that claimant's 1989 claim was a duplicate claim because it was filed more than one year after the previous denial.

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[1] Subsequently, the Board granted claimant's motion for reconsideration but denied the relief requested. The Board, however, instructed the administrative law judge to consider claimant's 1989 claim under the standard recently promulgated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), if the administrative law judge found that the 1989 claim was a duplicate claim. *Wright v. Manning Coal Corp*., BRB No. 93-0838 BLA (December 23, 1996)(unpub.); Director's Exhibits 59, 61.

Considering claimant's duplicate claim pursuant to Section 725.309(d) and *Ross, supra*, the administrative law judge found that the x-ray evidence developed since the prior denial established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), an element of entitlement previously decided against claimant. The administrative law judge therefore concluded that claimant demonstrated a material change in conditions as required by Section 725.309(d).

Turning to the merits of the claim, the administrative law judge found that all of the relevant evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1), 718.203(b). The administrative law judge additionally found pursuant to Section 718.204(c)(4) that the medical opinions of record established that claimant lacks the respiratory or pulmonary capacity to perform his usual coal mine employment as a welder, work which the administrative law judge found was heavy labor. The administrative law judge concluded that those medical opinions outweighed the non-qualifying[2] pulmonary function and blood gas studies, and established that claimant's total respiratory disability was due at least in part to pneumoconiosis pursuant to Section 718.204(b). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant's applications for benefits were timely filed. Employer asserts further that the administrative law judge erred in his analysis of the medical evidence pursuant to Section 718.204(c)(4). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to affirm the administrative law judge's finding that claimant's claims were timely filed.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The statute of limitations found at Section 422(f), 30 U.S.C. §932(f), provides that:

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[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[3] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, and pursuant to 20 C.F.R. §§725.309(d), 718.202(a)(1), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later-
>
> (1) a medical determination of total disability due to pneumoconiosis; or
>
> (2) March 1, 1978.

30 U.S.C. §932(f). The implementing regulation provides in pertinent part:

> (a) A claim for benefits . . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner . . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed.

20 C.F.R. §725.308. To constitute a "medical determination" that was "communicated to the miner" so as to trigger the statutory time limit for filing a claim, a medical report or workers' compensation board finding must be adequately documented and reasoned and must clearly indicate a determination that the miner is totally disabled due to pneumoconiosis. *Adkins*, 19 BLR at 1-41-42.

Employer contends that the administrative law judge erred by finding that employer did not rebut the presumption that claimant's 1986 claim was timely filed. Employer's Brief at 4-9. Contrary to employer's contention, however, the administrative law judge found within his discretion that neither Dr. Odom's report nor the Kentucky workers' compensation award constituted "medical determination[s] of total disability due to pneumoconiosis" that were "communicated to" claimant. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Adkins, supra*.

Specifically, the administrative law judge permissibly found that Dr. Odom's report was insufficiently documented and reasoned to qualify as a medical determination. *See Adkins, supra*. Substantial evidence supports the administrative law judge's finding that Dr. Odom did not explain how he concluded that claimant was "[t]otally and permanently disabled," when the pulmonary function study attached to Dr. Odom's report was non-qualifying and Dr. Odom did not administer a blood gas study. Director's Exhibit 17; *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Additionally, as highlighted by the administrative law judge, Dr. Odom did not state that claimant was totally disabled <u>due to pneumoconiosis</u>. Director's Exhibit 17; *see Adkins, supra*. Furthermore, because no medical evidence is discussed in or attached to the 1975

workers' compensation award, substantial evidence supports the administrative law judge's finding that the workers' compensation board finding was insufficiently documented to constitute a medical determination. *Id*. Therefore, we affirm the administrative law judge's finding that these items were insufficient to trigger the three-year time limit,[4] and that therefore, employer did not rebut the presumption that claimant's 1986 claim was timely filed. *See* 20 C.F.R. §725.308(c).

Substantial evidence also supports the administrative law judge's finding that claimant abandoned his 1986 claim. Claimant testified at the hearing that he did not withdraw his 1986 claim and that he took no further action after his attorney informed the district director that claimant did not intend to pursue the claim. Hearing Transcript at 70-71. The record does not indicate that claimant took any action after the district director informed him that his 1986 claim would be deemed abandoned if he did not respond within thirty days. *See* 20 C.F.R. §725.409(b). Therefore, we affirm the administrative law judge's finding that claimant's 1986 claim was denied as abandoned, and his finding that claimant's 1989 claim was therefore a duplicate claim. As employer does not challenge the administrative law judge's finding that a material change in conditions was established in the subsequent claim, *see* note 3, *supra*, we now turn to the administrative law judge's consideration of the merits.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.204(c)(4), employer contends that the administrative law judge did not adequately assess the documentation and reasoning of the two medical opinions that he credited to find that claimant has a totally disabling respiratory impairment. Employer's Brief at 9, 15-16. This contention has merit.

Review of the record indicates that, as the administrative law judge found, all of the pulmonary function and blood gas studies are non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(1)-(3). Therefore, the remaining method of proving disability required claimant to submit a

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[4] Accordingly, we do not address employer's contention that claimant received and understood these items. Employer's Brief at 6-7. Additionally, since the administrative law judge properly found that the three-year time limit was not triggered, *see Adkins, supra*, we reject employer's argument that the district director's earlier finding that the 1986 claim was time-barred is binding and now bars claimant's 1989 claim. Employer's Brief at 11-13.

physician's documented and reasoned medical judgment diagnosing total respiratory disability. *See* 20 C.F.R. §718.204(c)(4).

In April 1989, Dr. Cordell Williams examined and tested claimant and diagnosed "COPD with 1/0 QP pneumoconiosis and pulmonary emphysema" and coronary artery disease. Director's Exhibit 7 at 4. Dr. Williams rated claimant with a "moderately severe impairment of the pulmonary system due to emphysema," and added that claimant's heart disease "would prevent him from doing strenuous work." *Id*. Two years later, Dr. Glen Baker examined and tested claimant and diagnosed coal workers' pneumoconiosis, category 1/1 and chronic bronchitis. Director's Exhibit 36. Dr. Baker indicated that claimant's pulmonary function and blood gas studies were "normal," but nevertheless checked a block indicating that claimant lacked the pulmonary capacity to perform his usual coal mine employment. Director's Exhibit 36 at 4-5. Dr. Baker's explanation for checking this block read, "Patient should have no further exposure to coal dust . . . due to his coal workers' pneumoconiosis and chronic bronchitis. He may have difficulty doing sustained manual labor on an 8 hour basis, even in a dust-free environment, due to these conditions." Director's Exhibit 36 at 5.

The administrative law judge found that Dr. Williams's report, as supported by Dr. Baker's opinion, established that claimant is unable to perform his usual coal mine employment. Decision and Order on Remand at 18. In weighing a medical opinion, the administrative law judge must "examine the validity of the reasoning of [the] medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In accepting Dr. Williams's opinion as evidence of disability, the administrative law judge did not indicate how he assessed Dr. Williams's reasoning in light of these factors. Consequently, we are unable to affirm the administrative law judge's finding pursuant to Section 718.204(c)(4). Therefore, we vacate the administrative law judge's finding and remand this case for him to determine whether Dr. Williams's assessment of a moderately severe respiratory impairment[5] constitutes a reasoned medical judgment under Section 718.204(c)(4). Additionally, the administrative law judge should identify and assess the underlying support for Dr. Baker's opinion that claimant "may have difficulty" performing sustained manual labor.[6] Director's Exhibit 36.

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[5] Claimant must establish that his respiratory or pulmonary impairment is totally disabling; non-pulmonary impairments have no bearing on establishing total disability. *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995).

[6] Dr. Baker's statement that claimant should have no further exposure to coal dust does not support a finding of total respiratory disability. *See Taylor v. Evans and Gambrel Co*., 12 BLR 1-83, 1-88 (1988).

If the administrative law judge determines that Dr. Williams's and Dr. Baker's opinions are sufficiently reasoned, he must compare them with the specific exertional requirements of claimant's coal mine employment, which are listed at Director's Exhibits 4, 17. *See Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). If the administrative law judge again determines that the medical opinions establish total disability, and that the weight of the contrary probative evidence considered together establishes total disability, *see Beatty, supra*; *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), he must determine whether claimant's total disability is due at least in part to pneumoconiosis. *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge